

ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1120
(and consolidated cases)

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WEST VIRGINIA, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petitions for Review of Final Action
by the United States Environmental Protection Agency

PROPOSED BRIEFING FORMAT AND SCHEDULE

Pursuant to this Court’s July 19 order (ECF No. 2065493), the parties have conferred and have agreed on a proposed briefing schedule. The parties did not, however, reach consensus on an appropriate briefing format and word limits. Respondent United States Environmental Protection Agency (“EPA”) and undersigned Respondent-Intervenors (collectively “Respondents”) therefore submit their respective proposal at paragraph 18 below. Petitioners’ and Petitioner-Intervenors’ counsel (collectively “Petitioners”) are filing a separate proposal.

In support of Respondents’ proposal, Respondents submit as follows:

Background

1. These consolidated petitions seek review of an EPA rule promulgated under authority of section 111 of the Clean Air Act, 42 U.S.C. § 7411 that secures reductions in carbon dioxide (“CO₂”) emissions from fossil-fuel-fired power plants. The statutory and regulatory background are discussed in greater detail in EPA’s opposition to the motions for a stay. ECF No. 2059170.

2. Seventeen petitions for review of the Rule have been filed and consolidated under lead case No. 24-1120. While there are numerous State and Industry Petitioners, along with two Petitioner-Intervenors, their interests are largely aligned. All of the State and Industry Petitioners raise the same principal claim – contesting whether a system of emission reduction based on 90 percent

carbon capture is adequately demonstrated and achievable. *See generally* Petitioners’ motions for a stay.

3. A number of states and other governmental entities, industrial entities, and non-governmental organizations have intervened in support of EPA. These intervenors are described further in paragraphs 11-17 below.

4. In its July 19 order denying motions for a stay pending judicial review, this Court accepted EPA’s suggestion that “this case be expedited as an alternative means of protecting all parties’ interests.” ECF No. 2065493. The Court thus directed the parties to submit proposed formats that would “ensure this case can be argued and considered as early as possible in the court’s 2024 term.” *Id.*¹

5. Respondents attempted in good faith to reach consensus with Petitioners on a joint proposal. While the parties narrowed their areas of disagreement, and reached agreement on a proposed schedule, they were unable to reach consensus on format and word limits by the filing deadline.

Respondents’ Proposed Expedited Schedule

6. Considering the Court’s order to expedite briefing, the scope of the case, and the need for time-intensive review of government briefs by multiple levels of management personnel at EPA and the Department of Justice, EPA proposes a

¹ After the Court issued its July 19 order denying stay requests, stay movants have filed multiple applications with the Supreme Court seeking similar relief. Those opposed applications remain pending as of this date.

briefing interval of 35 days. Accordingly, EPA requests that the Court issue a scheduling order in which Petitioners' opening brief(s) would be due by September 6, 2024, which is 35 days from the date of this proposal, and EPA's responsive brief would be due by October 11, 2024. Respondent-Intervenors request that their briefs be due one week later, by October 18, 2024. To enable oral argument to be calendared as soon as possible thereafter in 2024, Respondents propose the following remaining scheduling deadlines: reply briefs due by October 25, 2024, the joint appendix due by October 29, 2024, and final briefs due by November 1, 2024.

Respondents' Formatting Proposal and Word Limits

7. In view of the complexity of the Rule and the number of Petitioners, Respondents believe that Petitioners are justified in seeking more words than a standard-length brief. Respondents are mindful, however, of the Court's admonition that it "looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief." ECF No. 2065493.

8. To avoid unnecessary duplication while providing an adequate number of words for Petitioners to brief their claims, Respondents propose that the number of words allotted to Petitioners be set at two standard-length briefs. Specifically, Respondents propose that a collective allotment of 26,000 words be provided in

aggregate to Petitioners and Petitioner-Intervenors for opening briefs. This would be somewhat more words than allotted to petitioners in similarly complex recent cases involving EPA Clean Air Act actions, but in the same general ballpark. *See* Scheduling Order in *Kentucky v. EPA* (D.C. Cir. 24-1087 et al.) (ECF No. 2065237) (allotting a total of 21,000 words to State and industry petitioners in challenge to EPA’s rule setting greenhouse gas emission standards for light-duty motor vehicles); *Western States Trucking Association, Inc. v. EPA*, (D.C. Cir. 23-1143 et al.) (allotting a total of 18,900 words to State and industry petitioners in challenge to EPA waiver of preemption allowing for enforcement of California heavy-duty motor vehicle regulations). Because of the need to address the issues raised by all Petitioners in a comparable level of detail, EPA requests that it be accorded the same total number of words allotted to Petitioners (i.e., 26,000 words if EPA’s proposal were to be accepted).

9. Respondents propose that the two Petitioner-Intervenors, the Tennessee Valley Public Power Association and the Louisiana Public Service Commission, be directed to join a brief of Petitioners with whom they are aligned. As an initial matter, Petitioner-Intervenors both failed to provide the requisite timely notice of their intent to file a separate petitioner-side brief. The Court’s July 2 order granting their motions to intervene (ECF No. 2062757) directed these intervenors to “notify the court, in writing, within 14 days of the date of this order” of their

intention to participate in support of petitioners and if so, “to provide a statement of the issues to be raised by the intervenors.” *Id.* That order further admonished that “[f]ailure to submit notification could result in an intervenor being denied leave to file a brief.” *Id.*

10. Regardless, there is no compelling need to provide Petitioner-Intervenors with the opportunity to file separate briefs because their interests are fully aligned with the interests of other Petitioners. The Tennessee Valley Public Power Association represents the interests of municipal and cooperative owned members who enter into power purchase contracts with the Tennessee Valley Authority. ECF No. 2057546. The interests of the Association are aligned with Petitioner National Rural Electric Cooperative Association (“NRECA”) (Case No. 24-1122), which represents electric cooperatives nationally. Indeed, many of the members of the Tennessee Valley Public Power Association are also members of NRECA. The Louisiana Public Service Commission is a state agency that regulates retail rates and services of electric utilities operating in Louisiana. ECF No. 2058549. The interests of the Commission are aligned with the interests of the State of Louisiana and the other State governmental petitioners in Case Nos. 24-1120 and 24-1121.²

² If Petitioner-Intervenors are granted leave to file their own briefs, Respondents believe they should not be provided with more cumulative words than a standard intervention brief (9,100 words).

Proposed Format for Respondent-Intervenors

11. Respondent-Intervenors include four distinct sets of entities: a coalition of States, a state agency, and local governments; a coalition of five public health and environmental organizations; a coalition of several of the nation's largest public and investor-owned utilities; and the Edison Electric Institute, a trade association representing investor-owned utilities, which has also filed a petition for review challenging the rule and is intervening to defend narrow applicability criteria and subcategories that allow power plants to avoid requirements to reduce their emissions. Respondent-Intervenors will avoid duplication of briefing, but have distinct perspectives and are not able to commit to joint briefing at this time. Accordingly, Respondent-Intervenors respectfully request leave to file up to four separate briefs.

12. Consistent with the ratio set forth in this Court's rules, Respondent-Intervenors respectfully request a collective word count equivalent to 70% of the words allotted to Petitioners and Respondents. *Compare* Fed. R. App. P. 32(a)(7)(B)(i) *with* D.C. Cir. R. 32(e)(2)(b) (70% ratio). 18,200 words for Respondent-Intervenors is justified in this case given the distinct interests and important perspectives of the four sets of entities described below.

13. State and Local Government Respondent-Intervenors are twenty-one States, five local governments, and one state agency.³ This Court ordinarily does not compel governmental intervenors to file joint briefs with other intervenors, D.C. Cir. R. 28(d)(4), and there is no reason to depart from that sound practice here. States have a well-established and particular “stake in protecting [their] quasi-sovereign,” proprietary, and sovereign interests from the harms that greenhouse gas emissions cause. *Massachusetts v. EPA*, 549 U.S. 497, 520-23 (2007).

14. The Public Interest Organization Respondent-Intervenors are five national and regional nonprofit environmental and public health organizations dedicated to protecting public health and the environment from increasingly dangerous climate change driven by greenhouse gas emissions. Collectively, they represent the interests of members located across the entire country who are affected by the Rule. They have broad expertise in the legal, administrative, technical, environmental, and public health aspects of power plant air pollution control. These organizations have participated extensively in the administrative

³ State and local government intervenors (“State Intervenors”) include New York, Arizona, Colorado, Connecticut, Delaware, Hawai’i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, District of Columbia, Boulder, Chicago, Denver, New York City, and the California Air Resources Board.

and judicial proceedings that preceded the Rule, including submitting hundreds of pages of legal and technical comments at every stage, backed by thousands of pages of documentary exhibits. The Public Interest Organization Respondent-Intervenors will coordinate with other parties to avoid duplication, but should be allowed to file their own brief as they have a different perspective from the other Respondent-Intervenors, which include state and municipal governments and industry parties.

15. Power Company Respondent-Intervenors are among the nation's largest electric utilities and power producers. For many years, Power Company Respondent-Intervenors have supported reasonable and consistent regulation of GHG emissions from fossil fuel-fired electric generating units to mitigate their impact on climate change. Seeking durable regulation that would support continued investment in emission reductions while maintain the reliability of the electricity grid, they have commented on EPA's Section 111 rules for GHG emissions from power plants and either initiated or intervened in litigation challenging those rules. They accordingly have a unique perspective and a strong interest in arguing that EPA possesses the authority to promulgate power-sector rules under Section 111 and that this Rule does not violate the major questions doctrine.

16. This Court permitted the same three sets of Respondent-Intervenors to file separate briefs in prior litigation involving the regulation of greenhouse gas emissions from power plants. *See* Order at 2, *West Virginia v. EPA*, ECF 1595922 (Jan. 28, 2016) (allowing filing of briefs of these three intervenor groups plus a fourth group, a clean energy trade association); Order at 1, *Amer. Lung Ass’n v. EPA*, ECF 1826621 (January 31, 2020). It is standard practice for the Court to allow governmental petitioners to file a separate brief due to their sovereign and quasi-sovereign interests. *See* D.C. Cir. R. 28(d)(4). Likewise, it is standard practice for this Court to permit separate briefs from environmental and industry parties. *See, e.g., Kentucky v. EPA*, Order at 1-2, ECF 2065237 (July 17, 2024).

17. With respect to the fourth Respondent-Intervenor, Edison Electric Institute (EEI), the arguments set forth in its intervenor brief necessarily depend to a large extent upon Petitioners’ arguments. Nevertheless, EEI anticipates filing a brief supporting EPA’s authority to subcategorize emission sources and set a unique best system of emission reduction for each subcategory, and supporting EPA’s promulgation of other compliance options and flexibilities.

Summary of Respondents’ Proposed Format and Word Limits

18. In summary, in light of the considerations discussed above, Respondents request that the Court establish the following proposed briefing schedule and format:

Filing	Date due	Words
Petitioners' opening briefs	September 6, 2024	26,000 words in the aggregate, divided into multiple briefs at Petitioners' discretion
Respondents' answering brief	October 11, 2024	26,000 words
Respondent-Intervenors' briefs	October 18, 2024	18,200 words, shared between up to 4 briefs
Petitioners' replies	October 25, 2024	13,000 words in the aggregate (see above)
Deferred appendix	October 29, 2024	n/a
Final briefs due	November 1, 2024	See above

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CERTIFICATE OF COMPLIANCE

The foregoing response to an order complies with the typeface and volume requirements of the rules of this Court and Federal Rules of Appellate Procedure.

The document is set in Times New Roman font, 14-point, and contains 1,998 words according to the word-count function of Microsoft Word.

/s/ Elliot Higgins
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CERTIFICATE OF SERVICE

I filed the foregoing document with the U.S. Court of Appeals for the District of Columbia Circuit on August 2, 2024, using the CM/ECF system. All parties are represented by counsel that are CM/ECF users and will be served by the CM/ECF system.

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